

Bardaville Electric, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local 498. Case 7-CA-32667

October 26, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On June 23, 1992, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bardaville Electric, Inc., Traverse City, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ We have not considered the evidence and exhibits offered by the Respondent's exceptions because they are not part of the record.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ Although the judge did not cite *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), we find that his analysis was consistent with that decision. We find that the General Counsel established its prima facie case that Fashbaugh's protected conduct—i.e., talking to a union organizer and signing a union authorization card—was a motivating factor in the Respondent's decision to terminate his employment. The burden then shifted to the Respondent to show that the same action would have taken place even in the absence of Fashbaugh's protected conduct. The judge found, and we agree, that the Respondent failed to meet its burden because its proffered explanation was pretextual. The finding of a pretext necessarily means that the reasons advanced by the Respondent either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel. Thus, the Board is entitled to infer that here, the Respondent's true motive for Fashbaugh's termination was unlawful—i.e., because of Fashbaugh's protected activity. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

A. Bradley Howell, Esq., for the General Counsel.
Christy Bardaville, pro se, for the Respondent.

DECISION

FRANK H. ITKIN, Administrative Law Judge. An unfair labor practice charge was filed in the above case on December 10, 1991, and a complaint issued on January 16, 1992. General Counsel alleges that Respondent Employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee David Fashbaugh on November 11, 1991, because of his protected union activities. Respondent Employer denies violating the Act as alleged. Respondent claims that it "laid off employee David Fashbaugh due to economic circumstances."

A hearing was held on the issues raised in Traverse City, Michigan, on May 20, 1992, and, on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

The Charging Party is admittedly a labor organization and Respondent is admittedly an employer engaged in commerce as alleged.

Respondent Employer is an electrical contractor. David Fashbaugh was hired by Respondent during the spring of 1989 and was "laid off" on November 11, 1991. He was a journeyman electrician at the time. Fashbaugh recalled, by way of background, that in the fall of 1990 he had the following conversation with Bruce Bardaville, owner and president of Respondent:

I [Fashbaugh] informed him [Bruce Bardaville] that my father wanted me to quit . . . and go to work for Long Electric which is a Union contractor. . . . I wasn't really interested in trying to organize a Union, just that my father really wanted me to go to work for a Union contractor. . . . He [Bruce Bardaville] said that I should do whatever I thought I had to do, that he really didn't want me to leave.

Fashbaugh remained an employee of Respondent. Fashbaugh's father was and is an executive board member of the Union.

Later, in the spring of 1990, Bruce Bardaville commented to Fashbaugh, while examining a job application, that

he [Bruce Bardaville] probably won't hire [the applicant] because . . . he thought [the applicant] had dealings with the Union . . . he really didn't want to hire anybody that had anything to do with Unions.

And, subsequently, also in the spring of 1990, Bruce Bardaville apprised Fashbaugh that a former employee, Glen Socia,

was an incompetent employee . . . and [Bruce Bardaville] thought [Socia] had dealings with the Union . . . and that was one of the reasons why he laid [Socia] off.

Fashbaugh next testified that commencing about late summer 1991 he spoke with Union Organizer Richard Taylor "about organizing Bardaville Electric." Fashbaugh told Taylor that he "was more interested in joining the Union." Taylor wanted Fashbaugh to "organize Bardaville." Fashbaugh signed a union authorization card for Taylor at the Union's

hall on November 8, 1991 (G.C. Exh. 2). He also discussed the Union with three coworkers including Mike Michaels.

Fashbaugh specifically recalled that on Friday, November 8, while he was speaking with Taylor at the Union's hall about signing a union authorization card and organizing Bardaville, coworker Mike Michaels telephoned Taylor "to cancel an appointment" with Taylor. Fashbaugh then explained to Taylor that he

thought that Mike Michaels was possibly leading Richard Taylor on because [Fashbaugh] knew from past experience that Mike Michaels was pretty much anti-Union

Fashbaugh, as he further testified, telephoned coworker Michaels on Saturday, November 9. Fashbaugh then asked Michaels "what he thought about Unions" and Michaels made clear that he was "against Unions." During this conversation, Fashbaugh informed Michaels that he had signed a union authorization card; that he had a "job lined up at Alpine Electric" but "didn't have a definite starting date"; and that he "he was quite undecided on whether to try to organize Bardaville."

Fashbaugh testified that he reported for work at Respondent's facility on Monday, November 11. Coworker Michaels was there in the office. Fashbaugh told Michaels that he "wasn't going to try to organize Bardaville" but "was just going to quit and go to work for Alpine when they called." Christy Bardaville, wife of owner Bruce Bardaville and office manager and secretary-treasurer of Respondent, then called Fashbaugh into the office. She apprised Fashbaugh that "work had really slowed down and that there wasn't enough work to keep [him] busy." Fashbaugh responded that

Chris Moutsatson, a fellow employee that [he] was working with at the time . . . on a church job, would have trouble trying to keep up with the carpenters and masons [on that job].

Christy Bardaville replied that "Bruce Bardaville was going to put his tools on and take up the slack of [Fashbaugh] not being there."

Fashbaugh noted that work remained to be done on the "church job" and he was also working at other sites about this same time where additional work remained to be done. Fashbaugh further noted that Friday was "pay day" at Bardaville Electric and he had received his check on Friday, November 8, without incident or any warning of being "laid off." In addition, there were "other times" when "work was slow" at Bardaville and he had not been laid off. And, he was at the time "third in line . . . in seniority" among some six journeymen electricians.

Fashbaugh subsequently received a copy of General Counsel's Exhibit 3, a letter from the Employer dated November 11, stating that "effective" November 11 he had been "laid off" "due to lack of work." Fashbaugh was instructed to return his "gas card"; "office keys"; "vehicle keys"; "access card"; "uniforms"; and "Company tools." The letter concluded: "Upon the return of all of the above items the Company shall issue your payroll check." Fashbaugh was never "called back to work."

James Weber, a friend of both Fashbaugh and Bruce Bardaville, recalled a conversation with Bruce Bardaville

during early December 1991 concerning the layoff of Fashbaugh. Weber testified:

I [Weber] talked to Bruce and I says, so I heard Dave was causing too many waves maybe, and he [Bruce Bardaville] says, yes. And then I said what's going on and he says, we're just busy, keeping busy; . . . if I wanted a Union in there I would have had one in there a long time ago . . . Dave might have been listening to his dad too much.

Christy Bardaville, wife of owner Bruce Bardaville and office manager and secretary-treasurer of Respondent, was the only witness for the Employer. Christy Bardaville testified that "we were having a terrible cash flow problem"; "we had a very wonderful first half" of fiscal 1991; "if it wasn't for the first half of 1991 we wouldn't have survived the last half of 1991"; "by looking at the numbers from the accountants at the end of the third quarter there were some decisions that had to be made . . . we really had to lay someone off due to lack of cash . . . [for] the first time"; "there was a substantial negative working capital in the last half of 1991."¹

Christy Bardaville admittedly selected Fashbaugh for lay-off out of seniority. She claimed that Fashbaugh had previously volunteered to take such a layoff.² She acknowledged that the "church job," referred to above by Fashbaugh, "went on through the spring of 1992." She acknowledged that "it was no secret that [Fashbaugh's] father had been encouraging him for some time to work for a union contractor" and "from time to time" her husband, Bruce, "does express his bad feelings towards the Union" "about the principles and the way they operate." Finally, she acknowledged that she was aware about September 1991 "that someone from the Union was contacting [their] people."

I credit the testimony of Fashbaugh and Weber as recited above. Their testimony is in large part undisputed and substantiated in part by admissions of Respondent. They impressed me as trustworthy and reliable witnesses. Insofar as the testimony of Christy Bardaville contradicts the above testimony of Fashbaugh and Weber, I find on this record the testimony of the latter witnesses to be more complete, reliable, and trustworthy. In short, as discussed below, I do not credit the Employer's assertion to the effect that Fashbaugh was "laid off" for economic reasons. Instead, I find and conclude that Fashbaugh was summarily fired on November 11 because of his protected union activities.

Discussion

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through rep-

¹ See R. Exh. 1, the Employer's 1991 profit and loss worksheets or records, which had been prepared in July 1991 and then January 1992 reflecting the respective prior 6-month periods. The Employer's fiscal year ended on December 31, 1991. Christy Bardaville claimed that she "would review [the] financial figures with [their] accountant at the end of each quarter."

² Fashbaugh explained that he had volunteered for such a layoff in the spring of 1990 to help his coworkers but no layoff was implemented. Fashbaugh noted that he had not volunteered for such a layoff in November 1991.

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "the right to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8(a)(3) forbids "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" An employer runs afoul of the above provisions by firing an employee because he has engaged in protected Section 7 activities.

The credited and essentially undisputed evidence of record shows that Respondent Employer was opposed to the Union representing its employees. Company President and owner Bruce Bardaville had made clear that

he [Bruce Bardaville] probably won't hire [an applicant] because . . . he thought [the applicant] had dealings with the Union . . . he really didn't want to hire anybody that had anything to do with Unions.

He similarly had made clear that he "thought" a former employee

had dealings with the Union . . . and that was one of the reasons why he laid [the employee] off.

Employee David Fashbaugh credibly testified that commencing about late summer 1991 he spoke with Union organizer Richard Taylor "about organizing Bardaville Electric." Fashbaugh signed a union authorization card for Taylor at the Union's hall on Friday, November 8, 1991 (G.C. Exh. 2). He also discussed the Union with three coworkers including Mike Michaels. Fashbaugh specifically recalled that on Saturday November 9 he telephoned coworker Michaels. Fashbaugh then asked Michaels "what he thought about Unions" and Michaels made clear that he was "against Unions." During this conversation, Fashbaugh informed Michaels that he had signed a union authorization card; that he had a "job lined up at Alpine Electric" but "didn't have a definite starting date"; and that he "he was quite undecided on whether to try to organize Bardaville."

Fashbaugh reported for work at Respondent's facility on Monday, November 11. Coworker Michaels was there in the office. Christy Bardaville, wife of owner Bruce Bardaville and office manager and secretary-treasurer of Respondent, then apprised Fashbaugh that "work had really slowed down and that there wasn't enough work to keep [him] busy." Fashbaugh responded that

Chris Moutsatson, a fellow employee that [he] was working with at the time . . . on a church job, would have trouble trying to keep up with the carpenters and masons [on that job].

Christy Bardaville replied that "Bruce Bardaville was going to put his tools on and take up the slack of [Fashbaugh] not being there."

Fashbaugh noted that work remained to be done on the "church job" and he was also working at other sites about this same time where additional work remained to be done. Fashbaugh further noted that Friday was "pay day" at Bardaville Electric and he had received his check on Friday,

November 8, without incident or any warning of being "laid off." In addition, there were "other times" when "work was slow" at Bardaville and he had not been laid off. And, he was at the time "third in line . . . in seniority" among some six journeymen electricians.

James Weber, a friend of both Fashbaugh and Bruce Bardaville, credibly recalled a conversation with Bruce Bardaville during early December 1991 concerning the layoff of Fashbaugh. Weber testified:

I [Weber] talked to Bruce and I says, so I heard Dave was causing too many waves maybe, and he [Bruce Bardaville] says, yes. And then I said what's going on and he says, we're just busy, keeping busy; . . . if I wanted a Union in there I would have had one in there a long time ago . . . Dave might have been listening to his dad too much.

Fashbaugh's father, as the Employer knew, was a Union official.

On this record, I find and conclude that employee Fashbaugh was summarily fired on Monday, November 11, because the Employer had become aware of his activities on behalf of the Union. I reject the Employer's assertion that the employee was suddenly laid off because of "economic reasons." Fashbaugh was terminated out of seniority; work remained for him to do; and he had not been warned or notified of a layoff when paid on Friday, November 8. The Employer has not credibly explained why it suddenly picked out Fashbaugh out of seniority for this layoff for alleged economic reasons which apparently had existed for some time. As Bruce Bardaville later explained:

[I]f I wanted a Union in there I would have had one in there a long time ago; . . . Dave might have been listening to his dad too much.

In sum, I find and conclude that Respondent Employer violated Section 8(a)(1) and (3) of the Act as alleged.³

CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce as alleged.
2. Charging Party Union is a labor organization as alleged.
3. Respondent Employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employee David Fashbaugh on November 11, 1991, because of his protected union activities.
4. The unfair labor practices found above affect commerce as alleged.

REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in the conduct found unlawful or like or related conduct and to post the attached notice. Affirmatively, Respondent Employer will be directed to offer employee

³I would also reject any argument that Fashbaugh would have, in any event, been laid off at the time for lawful economic reasons. As noted above, the Employer has not credibly and sufficiently established here that Fashbaugh would have been laid off on November 11 for lawful economic reasons.

Fashbaugh immediate and full reinstatement to his former job or, in the event his former job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his unlawful firing by making payment to him of a sum of money equal to that which he normally would have earned from the date of Respondent's discrimination to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest as provided in *New Horizon's for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, Respondent Employer will be directed to preserve and make available to the Board or its agents on request all payroll records and reports and all other records necessary to determine backpay under the terms of this Decision. And, Respondent Employer will also be directed to remove from its files any reference to the firing of Fashbaugh found unlawful herein, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Bardaville Electric, Inc., Traverse City, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily discharging employees because they support International Brotherhood of Electrical Workers, Local No. 498, or any other labor organization, or because they engage in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employee David Fashbaugh immediate and full reinstatement to his former job or, in the event his former job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his unlawful firing with interest as provided in the Board's decision.

(b) Expunge from its files any reference to the firing of employee Fashbaugh and notify him in writing that this has been done and that evidence of this unlawful firing will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying all payroll records,

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

social security payment records, timecards, personnel records and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay and compliance, as provided in this decision.

(d) Post at its Traverse City, Michigan facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁵If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we, Bardaville Electric, Inc., have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminatorily discharge employees because they support International Brotherhood of Electrical Workers, Local No. 498, or any other labor organization, or because they engage in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them under Section 7 of the National Labor Relations Act.

WE WILL offer employee David Fashbaugh immediate and full reinstatement to his former job or in the event his former job no longer exists to a substantially equivalent job without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of his unlawful firing with interest as provided in the Board's decision.

WE WILL remove from our files any reference to the firing of employee Fashbaugh and notify him in writing that this has been done and that evidence of this unlawful firing will not be used as a basis for future personnel action against him.

BARDAVILLE ELECTRIC, INC.